BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	

COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA

The Newspaper Association of America ("NAA") respectfully submits its comments in response to the Federal Communication Commission's ("Commission" or "FCC") *Further Notice of Proposed Rulemaking*.[1] NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

America's newspapers make significant use of telemarketing to build and maintain subscribership. For this reason, telemarketing is important to the financial health of newspapers. Furthermore, as local businesses with close ties to their communities, newspapers understand the need to telemarket responsibly and have strong incentives to honor consumers' requests not to be called.

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[1] *See* Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, *Further Notice of Proposed Rulemaking*, 68 Fed. Reg. 16250 (April 3, 2003). These comments supplement our previous comments in response to the Commission's initial *Notice Of Proposed Rulemaking*. Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, *Notice of Proposed Rulemaking*, 67 Fed. Reg. 62667 (October 8, 2002).

NAA and its members recognize the FCC's responsibility under the Do-Not-Call Implementation Act[2] to promulgate rules in the Telephone Consumer Protection Act ("TCPA")[3] proceeding that maximize consistency with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR") while not unduly burdening responsible telemarketing.[4] In so doing, it also is important that the FCC harmonize its actions with those of the states, which have taken the lead in regulating telemarketing within their jurisdictions. Specifically, NAA recommends:

- The FCC should take care not to disturb state policy decisions that have exempted newspapers from state Do-Not-Call provisions for intrastate calling;
- The FCC should maintain its current established business relationship definition; and
- Consistent with the duration period of a Do-Not-Call registration under the FTC's TSR, the FCC should provide that consumer opt-outs from a company's telemarketing expire after five years.

I. THE COMMISSION SHOULD NOT PREEMPT STATE LAWS THAT GIVE NEWSPAPERS AN EXEMPTION FROM STATE DO-NOT-CALL PROVISIONS FOR INTRASTATE CALLING

In this proceeding, the FCC seeks to harmonize its telemarketing regulations with the national Do-Not-Call list recently adopted by the Federal Trade Commission. In so doing, however, NAA respectfully urges the Commission also to recognize the extensive efforts undertaken by the states in regulating telemarketing, and to endeavor to harmonize with those efforts as well.

In particular, twelve states have made carefully considered policy decisions to exempt newspapers from certain telemarketing regulations or from restrictions on calling state residents

[2] Pub. L. No. 108-10 (2003).

[3] 47 U.S.C. § 227; implemented by FCC rules at 47 C.F.R. § 64.1200.

[4] 16 C.F.R. § 310.

appearing on "do-not-call" lists managed by the state.[5] Those states have recognized that newspapers are responsible telemarketers with close ties to their local communities and that they have strong incentives to be respectful of consumers' preferences. Nothing in the FTC's Do-Not-Call TSR, which applies only to interstate calls, affects or disturbs these state policy decisions regarding intrastate telemarketing. In acting pursuant to the Do-Not-Call Implementation Act, this Commission should ensure, as both a matter of policy and of comity, that its actions under the TCPA do nothing to disturb the effectiveness of these legitimate policy judgments made by a dozen states regarding the benefits of newspaper telemarketing and consumers' expectations under such laws.

Such comity is fully consistent with statutory law. In the TCPA, Congress provided that, if this Commission authorized a national Do-Not-Call list, such a list should be designed "to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law."[6] This evidences Congress's intent for this Commission to coordinate with the states in regulating telemarketing. Honoring exemptions created by the states for intrastate telemarketing, such as the newspaper exemption in particular, would promote this statutory mandate for cooperation by allowing state policy judgments to remain fully in effect for intrastate telemarketing.

Nothing in the TCPA or in the Do-Not-Call Implementation Act requires this Commission to preempt state laws in ways that would interfere with legitimate and responsible local telemarketing. On the contrary, FCC preemption is discretionary and, indeed, the TCPA

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[5] Alabama, Alaska, Arkansas, Florida, and Mississippi have exempted newspapers from "do not call" restrictions. Indiana exempts newspapers from "Do-Not-Call" obligations if they use their own employees or volunteers to make calls. In Idaho, Nevada, North Dakota, Oklahoma, Oregon and Washington, newspapers are exempt from certain telemarketing regulations.

[6] 47 U.S.C. § 227(c)(3)(J).

limits the FCC's preemptive power in connection with a Do-Not-Call list. In particular, the FCC may not "preempt any State law that imposes more restrictive intrastate requirements or regulation on" the making of telephone solicitations.[7] By expressly leaving undisturbed intrastate telemarketing laws, including exemptions contained therein, this Commission would allow states to enforce their legitimate determinations affecting the privacy of their residents. Moreover, in so doing, the FCC also would avoid any litigation over the scope of its preemptive power. In particular, the Commission would avoid having to determine whether a particular state telemarketing law that happens to include a specific exemption for intrastate telemarketing by newspapers (or any other state law exemption or exception) is more or less restrictive than federal law.

As a matter of policy, harmonizing with the FTC's TSR in a way that honors the considered judgments of the states that have enacted newspaper exemptions in their telemarketing do-not-call laws would not disrupt consumer expectations and would help maintain the benefits consumers receive from newspapers. NAA already has mentioned the close ties of newspapers to their communities and their strong incentives to engage in responsible telemarketing. Consumers in those states currently can and do receive telemarketing calls from newspapers, and NAA is aware of no complaints that have arisen under those laws.[8] At the same time, these exemptions help newspapers in those states assist their readers in forming and maintaining their subscriptions. By sustaining subscribership, telemarketing is valuable to the financial health of the newspaper business.[9]

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[7] 47 U.S.C. § 227(e)(1).

[8] *See Comments of the Newspaper Association of America*, CG Docket No. 02-278 (Submitted December 9, 2002).

[9] In our previous comments, the NAA explained that consumer response to newspaper telemarketing demonstrates that these calls often provide a convenience for consumers. The

II. THE FCC SHOULD MAINTAIN ITS CURRENT ESTABLISHED BUSINESS RELATIONSHIP DEFINITION

NAA urges the FCC to maintain its current definition of established business relationship contained in its regulations implementing the TCPA. Maintaining the FCC's current exemption for "established business relationship" would allow businesses to make telemarketing calls to consumers with whom they have a prior or existing relationship formed by a voluntary two-way communication and not previously terminated by either party.[10]

While NAA is gratified that the FTC did recognize, in its amended TSR, the need for an exemption for calls arising from an "established business relationship," we believe that the FTC did not balance in the most appropriate way the interest of creating a Do-Not-Call list against the need for businesses to contact individuals with whom they have a preexisting business relationship. Instead, NAA believes that the definition previously adopted by this Commission, whose jurisdiction extends (unlike the FTC's) to intrastate telemarketing as well, is more reasonable. When it adopted its current definition of established business relationship, this Commission rejected narrower definitions, including specifically a proposed definition that (like that of the FTC now) would have made business relationships exempt only where consideration was exchanged.[11] As this agency recognized, "such narrow definitions may exclude legitimate

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NAA also explained that newspapers are responsible telemarketers that rely on local goodwill and are sensitive to community standards and concerns. *See id.*

[10] *See* 47 C.F.R § 64.1200(f)(4).

[11] *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752 at 8752 (October 16, 1992) ("The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer. A broad definition of the business relationship can encompass a wide variety of business relationships (e.g. publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record").

categories of business relationships."[12] And, or course, consumers can still control telemarketing calls by ending an established business relationship if they so desire.[13]

III. THE FCC SHOULD HARMONIZE THE EXPIRATION OF ITS COMPANY-SPECIFIC DO-NOT-CALL RULE WITH THE FTC'S TSR

NAA recommends that a consumer's opt-out from a company's telemarketing should expire after five years (as under the FTC's national Do-Not-Call rule[14]) instead of this Commission's ten-year requirement.[15] Making the life of these requests consistent with the FTC's rule would facilitate the creation of more manageable and accurate do-not-call lists.[16] Furthermore, in order to ensure that the rules are understandable and to increase the likelihood that newspapers seeking to comply with the rules will not make inadvertent mistakes, it would be less confusing and simple if Do-Not-Call requests, whether via the national registry or a company-specific request, had consistent five-year durations.

IV. CONCLUSION

For these reasons, NAA respectfully requests the FCC to recognize that telemarketing is essential to newspapers, and to harmonize its telemarketing rules with those of the FTC and the states in a manner that does not disturb state laws that grant a specific newspaper exemption to

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[12] *Id.*

[13] *See id.* at 8755, 8767 (stating "we decline to adopt definitions offered by commenters where such definitions fit only a narrow set of circumstances, in favor of broad definitions which best reflect legislative intent by accommodating the full range of telephone services and telemarketing practices.").

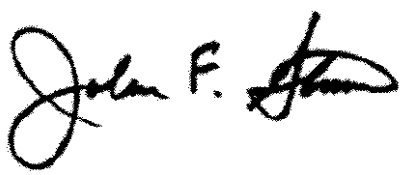
[14] *See* Telemarketing Sales Rule, 68 Fed. Reg. 4640 (January 29, 2003) (stating "[t]he Commission has determined that consumer registrations will remain valid for five years, with the registry periodically being purged of all numbers that have been disconnected or reassigned.").

[15] 47 CFR § 64.1200(e)(vi).

[16] This position differs from that in our previous comments, in which we urged this Commission to rule that a Do-Not-Call request should expire after a period shorter than 5 years.

state do-not-call rules. This will allow newspapers in those states to continue their responsible telemarketing to existing or past customers. In addition, the FCC should maintain its current established business relationship exemption, and set a lifespan of five years on a consumer's Do-Not-Call request.

Respectfully submitted,



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